Supreme Court, U.S.
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No. 96-1487

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER,

v.

HOSEP KRIKOR BAJAKAJIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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A. As we show in our opening brief (at 15-27), the forfeiture of respondent's cash is not an excessive fine, because the cash is an instrumentality of respondent's currency transportation offense and because instrumentality forfeitures are proportionate remedial sanctions, not excessive fines.

1. a. Respondent contends (Br. 15-16) that his unreported cash was not an instrumentality of his offense, because money is both lawful to possess and to transport across the border. Historically, however, property subject to forfeiture has not been limited to property that is unlawful to possess. Instead, forfeiture laws have long authorized the seizure of lawful property when it becomes significantly involved in an offense. See *United States* v. *92 Buena*

Vista Avenue, 507 U.S. 111, 119-121 (1993) (plurality opinion); see also *Austin* v. *United States*, 509 U.S. 602, 627-628 (Scalia, J., concurring in part and concurring in the judgment). In some cases, the inquiry into whether property is significantly involved in an offense presents close questions. Here, however, the cash subject to forfeiture is the very property that respondent sought to transport across the border without the required declaration. Respondent's cash is not merely substantially involved, but entirely and indispensably involved, in that offense.

In that respect, the cash subject to forfeiture in the present case is identical to the goods made subject to forfeiture under early customs laws (see U.S. Br. 15), and the gems that were subject to forfeiture in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam). The early customs laws authorized forfeiture of goods that were entered into the country without the required declarations (Act of July 31, 1789, ch. 5, §§ 12, 23, 1 Stat. 39, 43), and in *One Lot Emerald Cut Stones*, this Court upheld against a double jeopardy challenge the forfeiture of gems that were entered into the country without the required declaration.

Respondent contends (Br. 18) that the gems in *One Lot Emerald Cut Stones* constituted contraband. But it is unclear whether that characterization is correct, or how it would assist him in any event. The gems in *One Lot Emerald Cut Stones* were lawful both to possess and to transport. They were subject to forfeiture in that case only because they were transported across the border without the filing of a declaration. 409 U.S. at 234. The same factors exist here. It is lawful to possess cash and to transport it across the border. But if an attempt is made to transport more

than $10,000 in cash across the border without the required declaration, the money becomes subject to forfeiture as a consequence of the offense.

b. Respondent contends (Br. 16-17) that, if unreported cash is an instrumentality of a currency transportation offense, earned income would have to be an instrumentality of the offense of failing to file an income tax return. There is no historical basis, however, for treating earned income as an instrumentality of the offense of failing to file an income tax return, and the relationship of the money to the offense is different. The cash in a currency transportation offense, like the gems in *One Lot Emerald Cut Stones*, is the very property that is physically transported across the border, and physical transportation of the property is an actus reus of the offense. Although earning income is a necessary precondition to the offense of failing to file an income tax return, the actus reus of the offense is simply the failure to file the return. See 26 U.S.C. 7203. Thus, treating the cash involved in a currency transportation offense as an instrumentality of that offense does not imply that earned income is an instrumentality of the offense of failing to file an income tax return.

c. Respondent also contends (Br. 16) that his cash was not an instrumentality, because there was no indication that his cash was to be used in the commission of "any other criminal offense," such as money laundering. The forfeiture in this case, however, is premised on the involvement of respondent's cash in the offense of willfully violating the prohibition against transporting more than $10,000 across the border without filing the required currency report, not on its involvement in some other offense. See 18 U.S.C. 982(a)(1) (requiring forfeiture

of property involved in a currency transportation offense); 31 U.S.C. 5322(a) (making willful violation of the reporting requirement a criminal offense). Respondent's cash was the central instrumentality of his currency transportation offense; whether it was derived from or involved in some other offense is irrelevant.

2. Respondent and Amicus Clarendon Foundation contend (Resp. Br. 14; Amic. Br. 11-12) that a showing that the property forfeited is an instrumentality of an offense is not sufficient to satisfy the Excessive Fines Clause, and that an inquiry into the culpability of the owner is also necessary. But, as we show in our opening brief (at 15-17), for 200 years, Congress has authorized the forfeiture of property substantially involved in an offense, without an inquiry into the owner's culpability. That practice is constitutional because it is based on a reasonable judgment by Congress that such forfeitures are fair remedial sanctions, regardless of proof of individual culpability. As this Court has explained, "[t]o the extent that such forfeiture provisions are applied to [persons] who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care * * * [over] their property." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 687-688 (1974). And by dispensing with a judicial inquiry into wrongdoing, such a forfeiture scheme "precludes evasions" by those who may otherwise be able to conceal their culpability. *Van Oster* v. *Kansas*, 272 U.S. 465, 467-468 (1926).

In *Bennis* v. *Michigan*, 116 S. Ct. 994 (1996), the Court reaffirmed that the forfeiture of property that is substantially involved in an offense does not violate the Due Process Clause as applied to so-called "innocent owners." The Court relied on the long history of that practice, *id.* at 998-999, and the distinct remedial aims of such forfeitures, *id.* at 1000-1001. Those same considerations demonstrate that the forfeiture of property that is significantly involved in an offense is not an excessive fine.*

B. Even if it were necessary to consider culpability as an element of an excessive fines inquiry, the forfeiture of respondent's unreported cash would still be constitutional because petitioner committed a serious criminal offense. See U.S. Br. 27-34.

1. In arguing that the offense in this case was not serious, Amicus Clarendon Foundation contends (Br. 6-7) that the government did not have to show that respondent knew that it was unlawful to fail to file a currency report. That contention is incorrect.

Under 31 U.S.C. 5316, a currency report must be filed by any person who "knowingly * * * transports, is about to transport, or has transported, monetary instruments of more than $10,000 * * * from a place in the United States to or through a place outside the United States." 31 U.S.C. 5316(a)(1)(A). In a civil case, a violation of that requirement is established by proof that a person knew that he was transporting more than $10,000, without proof that he knew that transporting that amount of cash requires the filing of a report. See *United States* v. *$94,000 in U.S. Currency*, 2 F.3d 778, 784-786 (7th Cir. 1993); *United States* v. *$359,500 in U.S. Currency*, 828 F.2d

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* Since the First Congress, the remedy for mitigating the sometimes harsh consequences of instrumentality forfeitures has been administrative remittance. *Calero-Toledo*, 416 U.S. at 689 n.27. That remedy is available here. 21 U.S.C. 853(i)(1) (criminal forfeiture); 31 U.S.C. 5321(c) (civil forfeiture).

930, 933-934 (2d Cir. 1987); *United States* v. *$47,980 in Canadian Currency*, 804 F.2d 1085, 1090-1091 (9th Cir. 1986).

Respondent, however, was convicted under 31 U.S.C. 5322(a) of the criminal offense of "willfully" failing to file the report required under Section 5316. In *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994), this Court construed the willfulness requirement in Section 5322(a) to require proof that the defendant "knew the [conduct] in which he engaged was unlawful." In order to convict respondent under Section 5322(a), it was therefore necessary to establish that respondent knew it was unlawful for him to transport more than $10,000 across the border without filing a report.

2. Respondent asserts (Br. 22) that he lacked a "criminally culpable intent" because his cash was obtained from a legitimate source and intended for a lawful purpose. Section 5322(a), however, makes it a criminal offense to violate the reporting requirement willfully, regardless of the source or intended use of the cash. 31 U.S.C. 5322(a). Respondent acted with "criminally culpable intent" when he deliberately failed to file such a report, knowing that it was unlawful to do so.

3. Respondent suggests that (Br. 18-20), because there was no proof that he was involved in money laundering or some other criminal activity, his offense was a minor one that does not warrant the forfeiture of the cash that he illegally attempted to export. The best measure of the seriousness of an offense, however, is the maximum penalties authorized by Congress. *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541-542 (1989). Here the maximum penalty for respondent's offense includes five

years' imprisonment, even when there is no other violation of the law. 31 U.S.C. 5322(a). The presence of other violations, such as money laundering, increases the maximum term of imprisonment to ten years' imprisonment. 31 U.S.C. 5322(b). The willful violation of the reporting requirement is therefore itself a serious offense, and the forfeiture of the cash that the defendant has deliberately involved in that offense is not an excessive fine.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

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